STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of STELLA M. MARKIEWICZ,
Deceased.

DONALD M. STREHL, Personal Representative of the Estate of STELLA M. MARKIEWICZ, Deceased,

Petitioner-Appellee,

v

MICHAEL J. MARKIEWICZ,

Respondent-Appellant.

UNPUBLISHED
September 21, 2004

No. 247455
Macomb Probate Court
LC No. 2001-171184-CZ

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Respondent appeals as of right from an order finding respondent liable to decedent's estate for funds deposited into a joint account held in respondent's and decedent's name and for the loss of several other accounts and assets. We affirm.

Respondent's mother, Stella M. Markiewicz, died September 20, 2001, leaving five adult children: Christine Markiewicz, Mary Ann Henderson, Suzanne H. Rea, respondent Michael J. Markiewicz, and William Markiewicz. Decedent suffered a stroke in 1995 and, as her health deteriorated during her last years, she executed several estate planning documents. While documents executed in 1996 list Suzanne Rea as decedent's personal representative, successor trustee, and alternate attorney in fact, documents executed on March 5, 1998, remove Rea and appoint respondent as decedent's personal representative, successor trustee, and general attorney in fact. With the exception of decedent's home, in which respondent was to receive a 66-2/3 % interest with the remaining 33-1/3 % to be divided equally between Rea, Henderson, and William, decedent's assets were to be divided equally among the four siblings.[1]

[1] Because Christine was completely disabled, she was excluded from the will and trust. Decedent planned to give extra money to Rea to care for Christine.

The trial court received testimony that, during her last years, decedent became increasingly dependent on respondent to the exclusion of her other children and that respondent encouraged this dependency by controlling decedent's finances and by physically placing himself between decedent and others. Additionally, respondent acted as decedent's agent in the sale of certain real estate property, the proceeds of which encompass a large part of the estate and which were deposited into a joint account listing respondent as the owner of the account with decedent as a signer on the account.

Respondent first asserts that the trial court erred in determining that, through application of an unrebutted presumption of undue influence, this joint account is the property of decedent's estate rather than the property of respondent as survivor. We disagree. A suit attempting to set aside a transaction because of undue influence is an equitable action. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). This Court reviews de novo a trial court's decision in an equitable action. *Slatterly v Madiol*, 257 Mich App 242; 248-249; 668 NW2d 154 (2003). However, this Court reviews findings of fact made by a probate court sitting without a jury for clear error. "A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993) (internal citations omitted).

There is a statutory presumption that deposits made to a joint account are the property of the survivor of that account. MCL 487.703. However, this presumption takes effect only "in the absence of fraud or undue influence." *Id.* And, the statutory presumption that a survivor to a joint account becomes sole owner of the account is rebutted in situations where a presumption of undue influence also exists. *Conant, supra* at 499. In *Erickson, supra* at 331, this Court stated the test for undue influence as well as for the presumption of undue influence:

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.
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> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [Citing *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

The trial court found that respondent was in a confidential relationship with decedent through his status as her attorney in fact and her trustee as well as through "his involvement with the transactions with the decedent over and above the status provisions." This finding is consistent with Michigan law. This Court has noted that a fiduciary relationship is created through the grant of a general power of attorney. *Conant, supra* at 498. In addition to

respondent's fiduciary relationship with decedent pursuant to his general power of attorney, respondent had a confidential and fiduciary relationship with decedent as her trustee and care provider during her last illness. The opening of the joint account for the deposit of monies from the sale of decedent's real estate benefited respondent by allowing him to use the funds to open and then close accounts originally intended by decedent to benefit respondent's siblings. Finally, respondent lived with and took care of decedent during her last illness when decedent was physically and emotionally weak and he was known to exclude other members of the family from visiting or speaking with decedent, giving respondent the opportunity to influence decedent's financial decisions. Pursuant to Michigan case law, the satisfaction of these factors creates a presumption of undue influence. *Erickson, supra* at 331.

The effect of a presumption of undue influence is not to shift the burden of persuasion but, rather, to shift the burden of production from petitioner to respondent. *Kar, supra* at 541-542. As the Court explained:

> If the trier of fact finds the evidence by the defendant [respondent] as rebuttal to be equally opposed by the presumption [of undue influence], then the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the "mandatory inference" remains unscathed. This does not mean that the ultimate burden of proof has shifted from plaintiff to defendant, but rather that *plaintiff may satisfy the burden of persuasion with the use of the presumption, which remains as substantive evidence, and that the plaintiff will always satisfy the burden of persuasion when the defendant fails to offer sufficient rebuttal evidence.* [Emphasis added.] [*Id.* at 542.]

Furthermore, when confronted with both the statutory presumption regarding joint accounts and the presumption of undue influence, this Court stated:

> [T]his presumption in defendant's favor [statutory presumption regarding joint bank accounts] was countered by another presumption which arose out of the instant factual situation. Where parties are involved in a confidential or fiduciary relationship and trust and confidence is reposed by one in the integrity and fidelity of another, and where the latter receives benefits as a result of such relationship, there arises a presumption that such benefits were procured by the exercise of undue influence.
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> Due to this latter presumption, the burden devolved upon the defendant to show, by a preponderance of the evidence, that undue influence was not operative. In satisfying this burden, the defendant is benefited by a permissible inference that the joint bank account was intended to pass to the survivor. This permissible inference remains as a vestige of the *rebutted statutory presumption.* [Emphasis added.] [Internal citations omitted.] [*Habersack v Rabaut*, 93 Mich App 300, 305-306; 287 NW2d 213 (1979).]

Here, the statutory presumption that respondent owns the joint bank account has been rebutted through the presumption of undue influence in this case. *Kar, supra.*

The trial court noted respondent's need to rebut the presumption of undue influence to defend "the activity that's resulted in an inordinate amount of assets being transferred into his name," and did not find respondent's testimony credible, stating, "defendant relates a series of self-serving statements that [decedent] told him or acted independently to enhance his share of the estate. There is no pertinent timely evidence from an independent source to substantiate [respondent's] claim." This Court will defer to a trial court's findings based on witness credibility. *Erickson, supra* at 331. The trial court did not err in finding that respondent failed to sufficiently rebut the presumption of undue influence.

As mentioned above, the principles of agency apply to powers of attorney. One such principle is that the agent may not "pervert his powers to his own personal ends and purposes without the consent of the principal after a full disclosure of the details of the transaction." *In re Susser Estate,* 254 Mich App 232, 234; 657 NW2d 147 (2002), quoting *VanderWall v Midkiff,* 166 Mich App 668, 677-678; 421 NW2d 263 (1988). Where an attorney in fact acts in his own interests and not under the direction of the principal, he will be liable to the estate for monies wrongfully obtained or transferred. *Id.* at 234-235. Here, testimony of the siblings supports the finding that decedent intended the proceeds of the real estate transaction [the funds found in the joint account at issue] to be divided equally among respondent, Rea, Henderson, and William. In fact, respondent's own actions in opening up three separate accounts for $100,000 in trust for each of his siblings further supports this finding. However, respondent then proceeded to close the account in trust for Rea, transfer the account in trust for Henderson to another bank, after which three checks, made payable to respondent, closed this subsequent account; respondent does not remember what happened to the funds in the account in trust for Rea and claims that the funds in the account for Henderson were deposited back into the real estate joint account. Because respondent failed to rebut the presumption of undue influence, respondent is liable to decedent's estate for these misappropriated funds.

Respondent next asserts that the trial court erred in finding respondent liable to decedent's estate for certain other assets that he argues were not in his control. We disagree. Given the evidence received during trial that respondent participated in the closing of the Hilliard Lyons account and was the last person seen with documentation allowing the $15,000 check to be drawn on the account and that the Sun America checks were deposited into his personal account pursuant to an endorsement which included his personal account number, the trial court had evidence before it supporting a finding that respondent benefited from these transactions. Therefore, the presumption of undue influence applies. The trial court did not err in finding that the Hilliard Lyons account and the Sun America accounts are property of decedent's estate and that respondent is liable to the estate for these monies. Likewise, respondent has failed to show that the trial court erred in determining that respondent is liable to the estate for the two treasury bills deposited into his personal account.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey